

IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. **79-239**

Supreme Court, U. S.

FILED

AUG 14 1979

MICHAEL RODAK, JR., CLERK

OTIS R. BOWEN, individually and in his official capacity as
Governor of the State of Indiana,

and

ROBERT D. ORR, individually and in his official capacity as
Lieutenant-Governor and Commissioner of Agriculture
of the State of Indiana,

and

GUY M. BEERBOWER, individually and in his official capacity
as President of the Indiana State Fair Board,

and

ESTEL L. CALLAHAN, individually and in his official capacity
as Secretary-Manager of the Indiana State Fair Board,

and

DR. HOWARD G. DIESSLIN, JOHN L. FOX, R. J. PANKE, O. K.
ANDERSON, WALTER H. BARBOUR, LINVILLE I. BRYANT, FREDERICK
J. BUMB, BERYL J. GRIMME, KENNETH W. HARRIS, GLADYS L.
McCORMICK, R. ROSS McKEE, ROBERT E. McKEE, DONALD E.
SMITH, DWIGHT A. SMOKER, PAUL G. THURSTON, and LOLA
YODER, individually and in their official capacities as
members of the INDIANA STATE FAIR BOARD,

Petitioners,

vs.

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., and
TYARI MOHAN DAS,

On behalf of themselves and all INTERNATIONAL SOCIETY OF
KRISHNA CONSCIOUSNESS members,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT**

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Petitioners, Otis R. Bowen, individually and in his official capacity as Governor of the State of Indiana, Robert D. Orr, individually and in his official capacity as Lieutenant-Governor and Commissioner of Agriculture of the State of Indiana, Guy M. Beerbower, individually and in his official capacity as President of the Indiana State Fair Board, Estel L. Callahan, individually and in his official capacity as Secretary-Manager of the Indiana State Fair Board, Dr. Howard G. Diesslin, John L. Fox, R. J. Panke, O. K. Anderson, Walter H. Barbour, Linville I. Bryant, Frederick J. Bumb, Beryl J. Grimme, Kenneth W. Harris, Gladys L. McCormick, R. Ross McKee, Robert E. McKee, Donald E. Smith, Dwight A. Smoker, Paul G. Thurston, and Lola Yoder, individually and in their official capacities as members of the Indiana State Fair Board, respectfully pray this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit), entered in Cause Number 78-2278 on May 16, 1979, which affirmed the judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division (hereafter District Court).

OPINIONS BELOW

The opinion of the Seventh Circuit issued on May 16, 1979 has not been officially reported. A copy of said opinion has been appended hereto at Page A-1. The September 5, 1978 order of the District Court has been reported at 456 F.Supp. 437 and a copy has been appended hereto at Page A-6.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 19(1)(b) of this Court, to review an opinion of the Seventh Circuit which has rendered a decision on an important question of federal law in conflict with applicable decisions of this Court.

The decision of the Circuit Court was entered on May 16, 1979. This Petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c).

QUESTION PRESENTED FOR REVIEW

1. Whether the Indiana State Fair Board's resolution, based upon compelling State Interest, constitutes a permissible limitation of the exercise of the religious freedoms protected by the First Amendment to the Constitution of the United States.

**CONSTITUTIONAL PROVISIONS AND STATE
RESOLUTION INVOLVED**

The First Amendment to the Constitution of the United States provides as follows:

Religious and political freedom. — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States provides, in part, as follows:

§ 1. Citizenship — Due process of law — Equal protection. — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The August 19, 1977 Resolution of the Indiana State Fair Board provides as follows:

Be it resolved, that in keeping with the on-going policies of the Indiana State Fair Board to make every effort to insure that its fairgoers are assured

the maximum opportunity to enjoy the Indiana State Fair, this board reaffirms its prior policy that no distribution of literature or solicitation of donations or the outright selling of literature or any other commodity shall take place anywhere except from the confines of a limited space previously rented by the board; that this policy of no wandering distribution of literature or solicitation or selling also be the on-going policy of this board throughout the entire year — even during non-fair time.

STATEMENT OF THE CASE

This Petition arises from an affirmance by the Seventh Circuit of an order issued by the District Court in the case of *International Society For Krishna Consciousness, Inc., et al. v. Otis R. Bowen, Governor of the State of Indiana, et al.*, Cause No. IP 77-521-C, whereby the District Court ordered the Petitioners herein permanently enjoined from confining to a booth Respondants' (Plaintiffs' below) solicitations and distribution of literature at the Indiana State Fair (hereafter Fair).

Facts Material To The Consideration Of The Questions Presented

The original lawsuit was commenced on August 25, 1977, when Plaintiffs filed a complaint in the District Court alleging that the Indiana State Fair Board (hereafter Fair Board) Resolution of August 19, 1977 was a violation of the rights of freedom of religion of the Plaintiffs as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and seeking an injunction to prevent enforcement of the Fair Board policy of prohibiting wandering solicitation, vending or distribution of literature, gifts or products by any exhibitor on the Indiana State Fairgrounds.

The action by Plaintiff was brought pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 2201, 28 U.S.C. § 2202 and 28 U.S.C. § 1343(3) and (4) and was decided on Cross Motions for Summary Judgment in favor of Plaintiffs, *ISKCON v. Bowen*, 456 F.Supp. 437 (1978).

Based upon stipulated facts, the District Court found that ISKCON did not apply for booth space at the Fair even though they were entitled to do so. Findings 8 and 9, A-11-12. In addition, the parties stipulated that the Fair Board had always had a policy of barring roving solicitations without regard to any religious test. From that stipulation, the District Court found that ISKCON had been "specifically offered" access to the Fair "upon the same terms and conditions as" all others were offered access, and that it had not been denied access to the Fair. Finding 20, A-14. The Court then found that the Fair Board, "by their policy and resolution are attempting to treat plaintiffs like every other organization coming upon the Indiana State Fairgrounds for the purpose of selling or exhibiting their wares, products, merchandise and philosophy." Finding 19, A-14.

The Fair Board asserted a compelling State Interest in regulating roving solicitations, based upon, *inter alia*, the stipulated fact that over 1,333,570 citizens attended the 1977 Fair. See Finding 14, A-13.

The Seventh Circuit recognized that the Fair Board had always had a uniform policy of prohibiting peripatetic solicitations. A-2.

The District Court held that the Fair Board resolution was unconstitutional because it constituted an unlawful prior restraint on the Plaintiffs' exercise of their religion. The District Court permanently enjoined "Defendants and their successors in office and their agents and employees" from "enforcing any rule, policy, practice, custom, regulation or resolution preventing or otherwise interfering with Plaintiff" in the practice of the Plaintiffs' religion in soliciting contributions and distributing gifts and literature. The District Court also permanently enjoined "Defendants, their agents, employees and all parties in active concert with them including their successors in office" from "applying, implementing or enforcing any rule, regulation, policy or resolution... which purports to require Plaintiffs" to "exercise their first amendment rights at the Indiana State Fairgrounds only from the confines of a booth previously rented to the plaintiffs by the Indiana State Fair Board."

REASONS FOR ALLOWANCE OF THE WRIT

I

The Fair Board's Resolution Constitutes a Permissible Limitation of First Amendment Rights.

A.

**This Court has held that freedom of religion is
subject to reasonable regulation.**

The issue of whether the First Amendment includes an absolute right to practice any religious belief or ritual has consistently been decided to be subject to reasonable regulation or control by the State. This was pointed out by this Court in *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1939):

... The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. *Thus the Amendment embraces two concepts, - freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.* The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly

deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. *It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.* (Emphasis Added) (Footnotes Omitted)

See also *Schnieder v. State*, 308 U.S. 147 (1939).

This purpose of the First Amendment was clear in the minds of the framers of the Constitution as revealed by the dissent in *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 124 (1943) where Justice Reed quotes from notes made during the Constitutional Convention:

The amendments were proposed by Mr. Madison. He was careful to explain to the Congress the meaning of the amendment on religion. The draft was commented upon by Mr. Madison when it read:

'No religion shall be established by law, nor shall the equal rights of conscience be infringed.'
Annals of Congress 729.

He said that he apprehended the meaning of the words on religion to be that Congress should not establish a religion and enforce the legal observance of it by law, nor compel men to worship God in any manner contrary to their conscience. *Id.*, 730.

The reading of the footnotes to Justice Reed's dissenting opinion found on Pages 122-124, *supra*, gives a great insight into the true intent of the framers of our Constitution in adding the First Amendment.

The point is rather clear that the State may limit the free "practice" of religion so long as such regulation is nondiscriminatory and so long as it does not "constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise." *Cantwell, supra*, at pg. 305.

B.

The State has a compelling State Interest which the Resolution protects.

The test established by this Court in countless cases has been whether there is a compelling State Interest which counters or overrides the First Amendment rights which are being limited. The test used by the District Court was the one espoused by Plaintiffs: that State Interest must rise to the level and magnitude of life and death to be a compelling State Interest. A reading of the voluminous First Amendment cases reveals that the test of what constitutes a compelling State Interest is controlled by what right is being limited and the particular circumstance of the case. *Cantwell v. Connecticut, supra*; *Douglas v. Jeannette*, 319 U.S. 157 (1943); *Schnieder v. State, supra*. In the cases where blood transfusions were required to save someone's life whose religion forbids such medical procedures, the test is one thing; right to life as against religious belief put into practice. In a case involving going door to door to evangelize one's religion, (*Cantwell, supra*), the test is quite different. At pages 306-307 of *Cantwell, supra*, the test of compelling State Interest is set forth:

Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. *Even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury.* Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent. *The State is likewise free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience.* But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a

religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution. (Emphasis Added) (Footnotes Omitted)

The test then properly should be in this case whether the State has a compelling interest "in the interest of public safety, peace, comfort and convenience." The District Court sought to limit the State Interest to that set out in the resolution itself. Clearly the State has additional interests and to deny them would be to deny to all citizens who are not members of ISKCON their constitutional rights. In addition to the interest of the State mentioned by the District Court, there are: (1) the interest of the free flow of vehicular and pedestrian traffic with which wandering solicitation or vending and distribution of literature clearly interferes; (2) the interest of preventing frauds by bogus religions, charities or other commercial enterprises which might seek to bilk the fairgoer; (3) the interest of preventing littering of the Indiana State Fairgrounds with unretained literature or gifts such as flowers; (4) the interest of public safety, for the Plaintiffs do pin flowers on people as a gift, and when the flower is discarded the exposed straight pin presents a safety hazard to barefooted pedestrians and little children who may attempt to pick up the pretty flower; (5) the interest of preventing violation of Indiana Statutes against battery, I.C. 35-42-2-1, which may result when the Plaintiffs' members attempt to pin flowers upon fairgoers who do not desire to receive them; and (6) the interest of providing to the other exhibitors and concessionaires at the Indiana State Fair an equal opportunity to display their wares and ideas without interference from wandering solicitors, vendors or distributors of literature and/or gifts who might drive potential customers away by accosting them while they stand in line. In fact, the last item did occur when Plaintiffs solicited at the 1977 Indiana State Fair on September 26-28, and occurred again throughout the ten-day long 1978 Indiana State Fair. Perhaps, separately, none of the above constitutes a compelling State Interest, but the State Interest is made up of all these things and combined they become a very compelling State Interest. The Seventh Circuit rejected these interests as compelling both individually and collectively. See Appendix, Page A-2.

As against the compelling State Interest just shown, Plaintiffs have the religious practice of Sankirtan which the District Court explained in Finding of Fact No. 3. See Appendix, Page A-10-11. The practice or performance of the act of Sankirtan can be effected from a booth because Plaintiffs can still evangelize, distribute gifts and literature and solicit and accept donations and contributions. All that the Fair Board's resolution curtails is the wandering which when weighed against the compelling State Interest is a permissible limitation of these First Amendment freedoms which Plaintiffs seek to exercise without restraint.

The Board has never questioned Plaintiffs' belief in any manner either as to validity or the sincerity of their beliefs. No one is permitted to engage in wandering vending, wandering distribution of literature or gifts or wandering solicitation and acceptance of contributions and donations on the Indiana State Fairgrounds. Everyone is treated equally. The Board exercises no discretion which can be arbitrarily applied as to whether or not any exhibitor at the Fair should be confined to a booth. Quite the contrary, all exhibitors, whether they be religious, charitable, commercial, or some private cause, are required to confine their activities to a booth. To do otherwise would deny to some exhibitors the equal protection of the law. This uniform requirement clearly meets the requirements as set forth in *Cantwell, supra*, at page 305:

The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose. *Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise.* (Emphasis Added)

In this case, the booth requirement was not created to restrain Plaintiffs or some other religion on the spur of the moment, but rather it represents an ongoing, continuing policy which seeks to create the maximum enjoyment for both the fairgoers and the exhibitors and is a policy which has existed since the Fair began.

Plaintiffs have been afforded the same rights and privileges provided to every other exhibitor on the Indiana State Fairgrounds and the Defendants have carefully balanced the rights of the fairgoer and the exhibitor without materially imposing upon either group. From the State's interest previously demonstrated, it is clear that the State has not violated either group's rights, but has, indeed, protected the rights of both the fairgoer and the exhibitor.

The Plaintiffs' position is that to seek booth space is to give up their First and Fourteenth Amendment rights, presumably because they might be turned down. The Defendants have provided very clear, concise standards and criteria for booth rental on the applications. Plaintiff refused to acknowledge those standards, and in fact, never applied for booth space. The Plaintiffs' position, when reduced to its simplest terms, is that the only permissible restraint is no restraint. The Defendants have attempted to follow the standard first articulated in *Cantwell, supra*, as to time, place and manner. These permissible restraints should not be eroded.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and order of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 78-2278

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC.,
Plaintiffs-Appellees,

v.

OTIS BOWEN, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. IP 77-C-521 — WILLIAM E. STECKLER, *Judge.*

ARGUED JANUARY 26, 1979 — DECIDED MAY 16, 1979*
Before PELL, and TONE, *Circuit Judges*, and LEIGHTON,
District Judge. **

PELL, *Circuit Judge.* The defendants appeal from a summary judgment granting a permanent injunction. The case was presented to the district court on a set of stipulated facts. The plaintiff, International Society for Krishna Consciousness, Inc. (ISKCON) alleges it is a religious organization which practices "Sankirtan," a ritual requiring its devotees to go into public places, disseminate and sell religious literature, and solicit contributions. The defendants are Indiana state officials responsible for the operation of the Indiana State Fair. ISKCON applied for permission to practice Sankirtan at the Indiana State Fair.

* This appeal was originally decided by unreported order on May 16, 1979. See Circuit Rule 35. The Court has subsequently decided to issue the decision as an opinion.

** Judge George N. Leighton of the United States District Court for the Northern District of Illinois is sitting by designation.

The defendants provided ISKCON with a standard application for a booth, informing ISKCON of its uniform policy to prohibit peripatetic solicitation on the fairgrounds. After an unsuccessful attempt by the parties to settle their differences, ISKCON brought this action in the district court.

The court entered a judgment permanently enjoining defendants and their successors from interfering in any way with the plaintiff when its members pay admission to the Indiana State Fair and practice the Sankirtan ritual described above on public thoroughfares of the fairgrounds during normal operating hours. The judgment also permanently enjoined the defendants and their successors from requiring the ISKCON members to practice Sankirtan in a booth. This injunction was issued subject to four conditions. The first required ISKCON members to wear identification cards. The second forbade ISKCON members from representing their activities as sponsored by or connected with any Fair or other government agency. The third forbade ISKCON members from touching unconsenting persons. Finally, the fourth condition forbade ISKCON members to practice Sankirtan with unconsenting persons waiting in line or watching a performance or attraction.

The defendants raise six government interests to justify confining Sankirtan to a booth. For the following reasons we hold that the interests urged do not justify the restriction. Furthermore, the consideration of these interests in combination does not change our decision. The defendants first urge that the public safety will be threatened. Although interference with vehicular and pedestrian traffic might under other circumstances justify restrictions on the activities at issue here, see, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940); *Schneider v. State*, 308 U.S. 147, 160 (1939); *ISKCON v. Rochford*, 585 F.2d 263, 268-69 (7th Cir. 1978), the defendants have submitted no evidence that serious disruption would result from permitting these activities. The only support the defendants have offered to show that the plaintiff's activities threaten this interest is a citation to the transcript in which the plaintiff's attorney mentions "the potential for interference with ingress and egress which my clients have bent over backward to avoid..." The district court properly did not accept this

single statement as proving the existence of a threat to public order and safety. Furthermore, even if the defendants had proved such a threat, the record contains no showing that the defendants were unable to regulate the activities in a less restrictive manner than by confining the plaintiff's activities to a booth. *Sherbert v. Verner*, 374 U.S. 398, 406-407 (1963); *Wright v. Chief of Transit Police*, 558 F.2d 67, 68 (2d Cir. 1977).

For the same reasons, we must reject the defendants' argument that the use of straight pins to attach flowers to the clothing of fairgoers threatens the state interest in public safety. According to the defendants, the discarded pins present a hazard to barefooted pedestrians and to children who attempt to pick up the flowers. The defendants have failed to prove that this theoretical threat actually exists or that the alleged danger could not be prevented in a manner less burdensome than by the use of a booth.¹

Other interests advanced by the defendants clearly can be protected by methods less restrictive than confining the practice of Sankirtan to a booth. The interest in combating fraud is served by the use of penal laws to punish this conduct. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 545, 559 (1975); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940).² Similarly, the state statute punishing batteries protects the interest in public safety threatened by the practice of pinning flowers on the fair patrons. In addition, we note that the injunction itself prohibits plaintiffs from making certain false representations and requires ISKCON members to wear identification cards. The injunction also contains a proviso against touching persons without consent. The state is thereby provided with more expeditious remedies against these abuses.

Finally, the defendants assert that the practice of Sankirtan generates litter and interferes with the business of other concessionaires. The generation of litter as a result

¹It is also unclear that requiring the devotees to use a booth would remedy this problem.

²Furthermore, we have difficulty seeing a relation between the state interest in preventing fraud and confining Sankirtan to a booth.

of the otherwise lawful distribution of literature does not justify the restrictions sought by the defendants:

Any burden imposed upon the . . . authorities in cleaning and caring for the streets as an indirect result of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive [the government] of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.

Schneider v. State, 308 U.S. 147, 162-63 (1939). The asserted interest in protecting the concessionaires from the interference described in the affidavits in the record likewise does not constitute a compelling interest and does not justify the particular form of confining restraint sought by the defendants. Although the presence of the wandering devotees near the booths of concessionaires may occasionally offend potential customers and drive them away, the Constitution forbids the defendants from restricting Sankirtan on this ground alone. The constitutional rights at issue here are "strong medicine" and the resulting "verbal tumult" or "discord" are their "necessary side-effects." *Cohen v. California*, 403 U.S. 15, 24-25 (1971). Even if the ritual at issue here so offended potential customers at the state fair that the state policy to foster commerce were placed in some jeopardy, which has not been shown to be the case, the restriction at issue here could not stand. As this court noted in *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 47 U.S.L.W. 3264 (1978):

That the effective exercise of First Amendment rights may undercut a given government's policy on some issue is, indeed, one of the purposes of those rights. No distinction is constitutionally admissible that turns on the intrinsic justice of the policy in issue.

578 F.2d at 1205.

The defendants' final argument, that requiring only commercial activities to be confined to a booth is a denial of equal protection of the laws, is without merit. "To require a parity of constitutional protection for commercial

and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978).

We emphasize, however, that we are affirming the injunction on the basis of the record before the district court. Sound judicial discretion may call for modification of this decree in the future, if the circumstances, whether of law or fact, in effect at the time of its issuance should change. *System Federation No. 91 v. Wright*, 364 U.S. 642, 646-47 (1961); *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932).

Finally, we are not unmindful, as anyone cannot be who has travelled through a major airport facility in recent years, that practitioners of Sankirtan have been regarded as annoying and often downright irritating by those they approach. It is not, however, the cases in which the auditor is in agreement with that which is being expressed which reach the courts under the rubric of the First Amendment. Distaste for what is being expressed, and often absolute revulsion, appear to be the hallmarks of the exercise of First Amendment rights and probably are the necessary contexts in which the preservation of those rights can be firmly assured.

The judgment of the district court accordingly is affirmed.

A true Copy:

Teste:

.....
Clerk of the United States Court of
Appeals for the Seventh Circuit

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

INTERNATIONAL SOCIETY FOR
KRISHNA CONSCIOUSNESS, INC.,
et al.

v.

OTIS R. BOWEN, Governor of
the State of Indiana, et al.

IP 77-521-C

**SUMMARY JUDGMENT GRANTING
PERMANENT INJUNCTION**

This matter having come before the Court on the cross motions for summary judgment of the plaintiffs and the defendants pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings filed in this action and the affidavits and memoranda of points and authorities submitted by the respective parties, and having further considered the stipulation of facts agreed to and submitted by the parties, and being of the opinion that no genuine issue as to any material fact has been shown to exist, and that the plaintiffs are entitled to judgment in their favor as a matter of law;

In accordance with the findings of fact and conclusions of law entered by the Court on this date in this cause,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment be entered in favor of the plaintiffs and against the defendants, jointly and severally.

Further, in accordance with the findings of fact and conclusions of law entered by the Court on this date in this cause, IT IS ORDERED that the existing preliminary injunctive relief be, and the same hereby is, made permanent and shall be binding upon the defendants and their successors in office.

IT IS FURTHER ORDERED that defendants and their successors in office and their agents and employees are permanently enjoined from enforcing any rule, policy, practice, custom, regulation or resolution preventing or otherwise interfering with plaintiffs, where plaintiffs' conduct consists of entering the Indiana State Fairgrounds after paying admission, going upon the pedestrian thoroughfares of the Indiana State Fairgrounds open to the general public, talking to members of the public about their religion, gratuitously distributing their religious literature, flowers or other items of nominal symbolic value, and soliciting contributions to support their church so long as such activities are restricted to the normal hours of operation of the Indiana State Fair.

IT IS FURTHER ORDERED that defendants, their agents, employees and all parties in active concert with them, including their successors in office, are permanently enjoined from applying, implementing or enforcing any rule, regulation, policy or resolution of the Indiana State Fair Board which purports to require that plaintiffs exercise their first amendment rights at the Indiana State Fair only from the confines of a booth previously rented to the plaintiffs by the Indiana State Fair Board.

This injunction is granted on the following conditions:

(1) ISKCON members will be issued with standard ISKCON I.D. cards and will wear them in a visible manner.

(2) ISKCON members will in no way express that any fair or government agency or any organization other than ISKCON is sponsoring and/or connected with their activities.

(3) ISKCON members will not engage in any deliberate touching of unconsenting persons.

(4) ISKCON members will not perform their activities with people engaged in sitting and watching a performance or other special attraction, or waiting in a ticket line, coat line or refreshment line unless prior unsolicited consent is expressed.

In addition to counsel of record, the Clerk shall cause copies of the Court's findings of fact, conclusions of law,

and summary judgment granting permanent injunction to be served upon each of the named defendants or their successors in office.

Costs shall be taxed against the defendants.

Dated this 5th day of September, 1978.

/s/ William E. Steckler

United States District Judge

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

INTERNATIONAL SOCIETY FOR
KRISHNA CONSCIOUSNESS, INC.,
et al.

v.

OTIS R. BOWEN, Governor of the
State of Indiana, et al.

IP 77-521-C

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a civil rights suit for declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983 (1976) and 28 U.S.C. §§ 2201 and 2202 (1976), brought by the International Society for Krishna Consciousness, Inc. and one of its devotees, concerning the constitutionality of the Indiana State Fair Regulation restricting to a rented booth plaintiffs' sought first amendment expression of freely circulating in those portions of the Indiana State Fairgrounds open to the public, proselytizing, distributing religious literature and gifts such as flowers, and soliciting donations to support their church.

The Court's jurisdiction is grounded upon 28 U.S.C. § 1343 (3), (4) (1976).

This suit was filed on August 25, 1977, and on that date, after hearing oral argument, the Court granted plaintiffs' application for a temporary restraining order which remained in effect during the duration of the 1977 Indiana State Fair.

On March 15, 1978, the parties filed cross motions for summary judgment accompanied by stipulations, affidavits and briefs and submitted the case to the Court as a question of law.

On August 18, 1978, the Court on plaintiffs' verified motion for immediate ruling on cross motions for summary

judgment or, in the alternative, reinstatement of injunctive relief, issued additional injunctive relief for the duration of the 1978 Indiana State Fair.

The Court has allowed ample time for the parties to submit any and all memoranda and affidavits and the cross motions for summary judgment are ripe for decision as a matter of law.

Pursuant to Fed. R. Civ. P. 56 the Court hereby GRANTS plaintiffs' motion for summary judgment, and pursuant to Fed. R. Civ. P. 52 the Court's findings of fact, based upon the stipulations of the parties, and the Court's conclusions of law are as follows.

FINDINGS OF FACT

1. Plaintiff International Society for Krishna Consciousness, Inc. and its members (collectively referred to hereinafter as "ISKCON"), is a duly organized not-for-profit corporation, incorporated under the laws of the State of New York and with various temples located throughout the United States and the world. The plaintiffs, through their members (referred to as "Devotees"), seek to educate the general public as to their religious beliefs by conversing with the general public and disseminating their religious beliefs, literature and information in public forums throughout the world in the age-old form of missionary evangelism. [Stipulation No. 1.]

2. The International Society for Krishna Consciousness, Inc. ("ISKCON") is not a cult but rather is an international religious society which espouses the religious and missionary beliefs of Hinduism as expressed by the Hindu denomination, Krishna Consciousness. Krishna Consciousness is the branch of Hinduism which believes in the absolute supremacy of a single God or Deity (in Sanskrit: "Krishna"). The antecedents of this monotheistic fundamentalist Hindu religion are ancient and pre-date Christianity. [Stipulation No. 12.]

3. Hinduism as expressed by Krishna Consciousness imposes on its members the duty to perform an evangelical religious ritual known as "Sankirtan" which consists of going out into public places and disseminating and selling

religious literature and soliciting contributions to support Krishna Consciousness. Sankirtan is directed to spreading religious truth as it is known to Krishna Consciousness, attracting new members and supporting ISKCON's religious activities. Donations and book sales are the very lifeblood and principle means of support of this religious movement. [Stipulation No. 13.]

4. Defendant Otis R. Bowen is the Governor of the State of Indiana and is charged with the duty and responsibility of appointing five (5) members of and to the Indiana State Fair Board (hereinafter "Board") and is an ex officio member of said Board with power to vote on all questions acted upon by said Board, pursuant to Ind. Code § 15-1-1-2 (1978). [Stipulation No. 3.]

5. Defendant Robert D. Orr is the Lieutenant Governor of the State of Indiana and by virtue of his office is the Commissioner of Agriculture and is thereby also an ex officio member of said Board with power to vote on all questions acted upon by said Board, pursuant to Ind. Code § 15-1-1-2 (1978). [Stipulation No. 4.]

6. Defendant Estel L. Callahan is the Secretary-Manager of the Board and in such capacity acts as a full-time paid employee and agent of the Board with authority and responsibility to carry out the policies and directives of the Board. [Stipulation No. 6.]

7. Defendants Dr. Howard G. Diesslin, John L. Fox, R. J. Panke, O. K. Anderson, Walter H. Barbour, Linville I. Bryant, Frederick J. Bumb, Beryl J. Grimme, Kenneth W. Harris, Gladys L. McCormick, R. Ross McKee, Robert E. McKee, Donald E. Smith, Dwight A. Smoker, Paul G. Thurston, and Lola Yoder, individually and in their official capacities as members of the Board, are charged, under Ind. Code § 15-1-1-2, generally with responsibility for administration of the Indiana State Fairgrounds and are charged specifically with the entire control of Indiana State fairs, including but not limited to the administration of space allocation and the responsibility for policy information. [Stipulation No. 7.]

8. Plaintiffs sought permission to distribute literature and to solicit and accept contributions at the 1977 Indiana

State Fair by means of correspondence to and from appropriate state officials and their legal counsel, which correspondence indicated, in pertinent part:

"This is *not a request for a booth*. It is a request to allow representatives of our religious organization to circulate in public areas of the fair while courteously approaching patrons to distribute religious literature, and request and accept contributions." [Emphasis in original.] [Stipulation No. 14.]

9. On July 8, 1977, the defendants advised the plaintiffs that they could apply for booth space but that defendants' policy remained the same as regards to no wandering solicitation, vending or distribution of literature being permitted on the fairgrounds. The defendants provided the plaintiffs with a standard exhibitor's application on July 19, 1977. [Stipulation No. 15.]

10. Plaintiffs, through their attorney, on August 17, 1977, had a conference with the legal counsel for the Board at which time certain conditions were discussed and agreed to in an effort to avoid the necessity of litigation and in a good faith spirit of compromise. On the following day, however, August 18, 1977, plaintiffs were taken into custody by defendants and their agents, interrogated, had their funds confiscated with no offer of a receipt, and threatened with arrest in the event they persisted in their attempts to distribute their literature and solicit contributions in the public areas at the fairgrounds without confining their activities to a previously rented booth. [Stipulation No. 19.]

11. Defendants do not question the validity or sincerity of plaintiffs' religious beliefs or motives. [Stipulation No. 22.]

12. Plaintiffs further attempted, in good faith, through legal counsel, to negotiate conditions with the Board's legal counsel pursuant to which they could exercise their constitutional rights. The Board, however, determined to and did reaffirm its current policy by resolution passed unanimously on August 19, 1977, which reads as follows:

Excerpt from the minutes of the meeting of the Indiana State Fair Board, held Friday, August 19, 1977:

"Upon motion of Mrs. Yoder, seconded by Mr. Robert McKee and unanimously carried, the following resolution was adopted:

"Be it resolved, that in keeping with the on-going policies of the Indiana State Fair Board to make every effort to insure that its fairgoers are assured the maximum opportunity to enjoy the Indiana State Fair, this board reaffirms its prior policy that no distribution of literature or solicitation of donations or the outright selling of literature or any other commodity shall take place anywhere except from the confines of a limited space previously rented by the board; that this policy of no wandering distribution of literature or solicitation or selling also be the on-going policy of this board throughout the entire year — even during non-fair time."

[Stipulation No. 20.]

13. Plaintiffs were admitted to the Indiana State Fairgrounds pursuant to a temporary injunction during the last three days of the Fair, August 26-28. During that time defendants received several oral complaints concerning the conduct of the plaintiffs in the course of plaintiffs' distribution of literature, solicitation of and accepting donations. While only one fairgoer was willing to reduce his complaint to writing, several of the concessionaires were willing to do so and submitted same to the defendants complaining in writing concerning the alleged effect of the activities of the plaintiffs during the last three days of the Fair on the commercial activities of the concessionaires. [Stipulation No. 24.]

14. Approximately 1,333,570 citizens of the State of Indiana and of the United States of America attended the 1977 Indiana State Fair on the Indiana State Fairgrounds which is some 238 acres in size with some 53 permanent buildings located thereon. [Stipulation No. 23.]

15. Plaintiffs' first and fourteenth amendment rights, specifically the right to freedom of speech, the right to free exercise of religion and the right to peaceably assemble are implicit in the concept of ordered liberty. [Stipulation No. 21.]

17. The parties agree that "state action" exists in this case within the meaning of that term in the context of civil rights actions under 42 U.S.C. § 1983 (1976). [Stipulation No. 10.]

18. The parties agree that the Indiana State Fair Grounds constitute a "public forum" within the meaning of that term in the context of the first and fourteenth amendments to the United States Constitution. [Stipulation No. 11.]

19. Defendants herein, by their policy and resolution are attempting to treat plaintiffs like every other organization coming upon the Indiana State Fairgrounds for the purpose of selling or exhibiting their wares, products, merchandise and philosophy. [Stipulation No. 18.]

20. Plaintiffs were not barred access to the 1977 Indiana State Fair. Defendants herein have specifically offered access to the grounds of the Indiana State Fair during the 1977 Indiana State Fair upon the same terms and conditions as it has offered said access to all other persons and organizations seeking the same, *i.e.*, within the confines of a previously rented booth. [Stipulation No. 17.]

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact the Court now makes the following conclusions of law.

1. This Court has jurisdiction of the subject matter and of the parties to this action pursuant to 42 U.S.C. § 1983 (1976) and 28 U.S.C. § 1343(3), (4) (1976).

2. The defendants in this action were acting under color of state law.

3. The plaintiffs' remedy at law is inadequate to provide them with complete relief from the actions of the defendants.

4. The plaintiffs' sought activity of proselytizing, distributing religious tracts and symbolic gratuities such as flowers constitutes first amendment expression. *See Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *International Society for*

Krishna Consciousness, Inc., 438 F. Supp. 1077, 1081 (S.D. Fla. 1977).

5. In the area of first amendment rights, one need not have applied for a permit in order to challenge a statute, rule, regulation or policy on constitutional grounds; standing is recognized because of the danger of tolerating, in the area of first amendment freedoms, the existence of penal or restrictive statutes or rules susceptible of sweeping and improper application. *International Society for Krishna Consciousness, Inc. v. Engelhardt*, 425 F. Supp. 176, 179 (W.D. Mo. 1977).

6. For requirements of the first amendment there is no difference between an ordinance or statute and a set of regulations or policy adopted pursuant to state authority; the only question to be decided is whether the regulation or policy meets constitutional requirements. *International Society for Krishna Consciousness, Inc. v. Rochford*, 425 F. Supp. 734, 739 (N.D. Ill. 1977).

7. The principle that the first amendment protects church tract distribution and funds solicitations to support the church was established thirty-five years ago in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and is no less vital today.

In *Murdock* the Supreme Court emphasized that the first amendment protection is in no way diluted by the "commercial" aspects of the solicitation:

"[T]he mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of a collection plate in church would make the church service a commercial project . . . It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern . . . Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." *Id.* at Ill. [Emphasis added.]

As the Court in *International Society for Krishna Consciousness, Inc. v. Rochford*, 425 F. Supp. 734, 739 (N.D. Ill. 1977) stated:

"And the mere fact that religious literature is sold, or contributions solicited, does not put this form of evangelism outside the pale of constitutional protection. *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 37 L.Ed. 1292 (1943); *International Soc. for Krishna Con. v. City of New Orleans*, 347 F. Supp. 945 (E.D. La. 1972)."

8. The Indiana State Fairgrounds constitutes a first amendment "public forum." Recently five Federal District Courts have issued injunctions prohibiting plaintiffs' sought expression and activity from being confined to a booth at a state fairgrounds. *Clark v. Wisconsin State Fair Park Board*, No. 78-C-373 (W.D. Wisc. Aug. 11, 1978); *Anderson v. Ionia Free Fair Association*, Civ. No. C 78-569CA (W.D. Mich. Aug. 7, 1978); *International Society for Krishna Consciousness, Inc. v. Wetzel*, Civ. No. 77-839 Phx-WPC (D. Ariz. Oct. 28, 1977); *International Society for Krishna Consciousness, Inc. v. Carey*, No. 77-CV-3281 (N.D. N.Y. Aug. 30, 1977); *International Society for Krishna Consciousness, Inc. v. New Mexico State Fair Commissioners*, No. 77-0568 Civil (D. N. Mex. April 28, 1977).

9. The fact that admission is charged to gain entrance to the particular "public forum" is of no consequence. As stated by Judge Tyler in the New York World's Fair case, *Farmer v. Moses*, 232 F. Supp. 154, 162 (S.D.N.Y. 1964):

"Contrary to defendants' arguments, those of us who pay the regular admission fee and attend the Fair cannot be totally insulated from our fellows, nor can we expect to be shielded from expressions or ideas which are unanticipated and unsolicited. An individual's right of privacy is of practical necessity limited by the rights of others when he leaves his home and ventures forth into public areas, even those which he must pay to enter."

10. Numerous public places, far more enclosed and less open than fairgrounds, have been held to be first amendment forums where persons may circulate and engage in first amendment expression. See e.g., *Chicago Area Mili-*

tary Project v. Chicago, 508 F.2d 921 (7th Cir. 1974), cert. denied, 421 U.S. 992 (1975) (airport); *Wolin v. Port Authority*, 392 F.2d 83 (2d Cir.), cert. denied, 393 U.S. 940 (1968) (bus terminal).

11. *International Society for Krishna Consciousness, Inc. v. Griffin*, 437 F. Supp. 666 (W.D. Pa. 1977), was a case in which the county commissioners and airport director of the Greater Pittsburgh International Airport attempted, among other things, to regulate the activities of the ISKCON devotees to the confines of designated "solicitation booths" within the terminal. In striking down such a requirement (identical in effect to the Board's regulation in the instant case), Judge Teitelbaum stated:

"[The ordinance] requires that solicitations occur only from designated solicitation booths and that any exchange of money must take place in such booths. This provision is likely to discourage contributions by requiring the traveler to go to a specific location if he desires to make a contribution. Most people are unlikely to go out of their way on their own initiative to make a contribution. Thus, the ISKCON members would be denied, or at least restricted in, the opportunity to solicit funds from those travelers who do not pass near the designated booth area. The defendants have asserted no justification for limiting ISKCON's First Amendment rights in such a manner. Accordingly, neither solicitation by ISKCON members nor exchanges of money can be confined to 'solicitation booths.'" *Id.* at 673.

12. Similarly, in *Wolin v. Port Authority*, 392 F.2d 83 (2d Cir. 1968), cert. denied, 393 U.S. 940 (1968), the Second Circuit concluded that a bus terminal, like the streets of a company town, the grounds of a fair, or the parking lot of a public center, was an appropriate place for the expression of first amendment rights, reasoning as follows:

"The Terminal building is an appropriate place for expressing one's views precisely because the primary activity for which it is designed is attended with noisy crowds and vehicles, some unrest and less than perfect order. Like a covered marketplace

area, the congestion justifies rules regulating other forms of activity, but it seems undeniable that the place should be available for use in appropriate ways as a public forum." *Id.* at 90.

13. It is fundamental that specific restrictions on the exercise of first amendment expression are inherently suspect and bear a heavy presumption against their constitutional validity. A specific restriction on the exercise of first amendment expression is sustainable only if it accomplishes a legitimate, compelling, and overriding governmental interest, only if the restraint is focused and neither overbroad nor overinclusive in meeting its objective, and only if it is unachievable by a less restrictive alternative. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976).

14. Even if another forum had been available, that fact alone would not justify an otherwise impermissible restraint. *See Southeastern Promotions v. Conrad*, 420 U.S. 546, 556 (1975); *Schneider v. State*, 308 U.S. 146, 163 (1939).

15. The regulation, policy or resolution of the Board is unconstitutional on its face and as applied to the plaintiffs in so far as it restricts their right to free exercise of their religion in denying them the opportunity to practice the required ritual of "Sankirtan." "Sankirtan," by definition, cannot be practiced from the confines of a booth, *International Society for Krishna Consciousness, Inc. v. Griffin*, 437 F. Supp. 666, 673 (W.D.Pa. 1977), and in order to validate such a policy, it is incumbent on the State to come forward with clear and convincing evidence of a "compelling governmental interest" sufficient to outweigh the first amendment rights of the plaintiffs. *International Society for Krishna Consciousness, Inc. v. Hays*, 438 F. Supp. 1077, 1081 (S.D.Fla. 1977). No compelling governmental interest has been put forth by the defendants and it is by now beyond dispute that constitutional rights, particularly those encompassed by the first amendment, cannot be proscribed or eroded by the State except for "weighty reasons."

16. We are not faced in the instant case with a situation where the Court must balance competing funda-

mental interests. Where life is in the balance, as has been the case in the numerous instances of litigation involving the Jehovah's Witnesses and the question of nonvoluntary blood transfusions, the interest of the State in the preservation of life has been properly seen to outweigh the clear but incidental infringement of the first amendment rights of the Witnesses. No such compelling or weighty governmental interest can be contemplated in the instant case. It is clear that adoption of the resolution for a salutary purpose (*e.g.*, so that fairgoers are assured the maximum opportunity to enjoy the Indiana State Fair) will not save what is otherwise a constitutionally deficient regulation of expression.

17. The Board's rejection of plaintiffs' request to use this public forum accomplished a prior restraint under a system lacking in constitutionally required minimal procedural safeguards. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552 (1975). The necessary procedural safeguards set forth in *Freedman v. Maryland*, 380 U.S. 51 (1965), include: first, the burden of instituting judicial proceedings and of proving that the material or conduct is unprotected must rest on the censor or licensor; second, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo, and third, a prompt final judicial determination must be assured. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. at 552.

In the instant case, no procedures whatsoever are included respecting any of the necessary procedural safeguards set out in *Freedman v. Maryland*. Indeed, the parties have stipulated that here the defendants have placed upon the plaintiffs the burden of contesting the Fair Board's policy or resolution and to pursue what they perceive to be their constitutional rights under the first and fourteenth amendments. [Stipulation No. 25.]

18. A certain amount of inconvenience, discomfort, litter or other incidental effects of first amendment protected activity is not a sufficient justification for restricting such activity. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. State*, 308 U.S. 146 (1939).

In *International Society for Krishna Consciousness, Inc. v. Evans*, 440 F. Supp. 414 (S.D. Ohio 1977), a similar regulation at the Ohio State Fair was upheld on the basis that it was a reasonable balancing of conflicting interests. Nevertheless, this Court concludes that the interests advanced by the Indiana State Fair Board are not compelling, and therefore do not justify the restriction imposed by the regulation at issue.

19. Moreover, under any test applied to restrictions on expression, the Indiana Fair rule is not sufficiently, narrowly, and precisely related to the interests advanced by the State. To prohibit plaintiffs from engaging in all first amendment protected expression in all public areas of the State Fair except in a specific booth in a specific building is a device too remotely related to the achievement of any governmental purpose to withstand constitutional scrutiny under any test which might be applied.

Consistent herewith the plaintiffs are entitled to summary judgment granting a permanent injunction.

Dated this 5th day of September, 1978.

/s/ William E. Steckler

United States District Judge